ends may be identical with the United States' has already been recognized by this REVIEW.[15] Whether that possibility still exists when the situation to be approved is the maintenance of the present mercantile marine status of the nations, is another question.

THE CONFLICT OF PRESUMPTIONS ON SUCCESSIVE MARRIAGES BY THE SAME PERSON. — In the recent California case of *In re Hughson's Estate: Brigham* v. *Hughson*,[1] the plaintiff, who had been married to the decedent by a ceremonial marriage, claimed a share in the estate as surviving wife. The defendant proved a ceremonial marriage between herself and the decedent, subsequent in time to the marriage of the plaintiff with the decedent, and proved that the marriage relation so created had continued till the time of decedent's death. It appeared that the plaintiff had remarried twice after the disappearance of the decedent, believing him dead. It further appeared that there were ten children by the marriage between the decedent and the defendant. The plaintiff declared that her marriage with the decedent continued down to the time of his death. The court held that the burden of proving that the first marriage had not been set aside by divorce was on the plaintiff, and that this burden had not been met, and that a divorce would therefore be presumed in favor of the second marriage.

Presumptions must necessarily play a large part in the proof of marriages. Actual evidence of the ceremony, or of its incidents, cannot always be procured, and proof of valid marriages would fail if such evidence were required. As a result a broad presumption in favor of the validity of apparent marriages characterizes English and American law.[2] This presumption not only dispenses with proof of ceremonial formalities where some form of marriage is shown to have been performed,[3] but predicates marriages, regardless of forms, on cohabitation and repute in the community.[4] Moreover, marriages, once established, are presumed to continue, aside from affirmative evidence to the contrary, or conflict of presumptions,[5] and the burden of proof is heavy upon one who attacks the validity of the protected status.[6]

As is usually the case where the law is related in terms of presumptions, difficulties arise where two presumptions in the same field conflict. So where a husband or wife contracts a second marriage before the termina-

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[15] 30 HARV. L. REV. 279, 283.

[1] 160 Pac. 548.

[2] Piers *v.* Piers, 2 H. L. Cas. 331; Dickerson *v.* Brown, 49 Miss. 357, 371, 372. The maxim *semper praesumitur pro matrimonio* seems to be an application of the general common law presumption in favor of innocence.

[3] Franklin *v.* Lee, 30 Ind. App. 31, 62 N. E. 78; Winter *v.* Dibble, 251 Ill. 200, 95 N. E. 1093. See Cooley, J., in Hutchins *v.* Kimmell, 31 Mich. 126, 130, and cases cited. The authority of the celebrant and the capacity of the parties, etc., are covered by the presumption.

[4] Mitchell *v.* Mitchell, 11 Vt. 134. See 1 BISHOP, MARRIAGE, SEPARATION AND DIVORCE, §§ 935, 936. See a complete collection of cases in L. R. A. 1915 E, 8, 56, 87. Common law marriage has been changed in many states by statute.

[5] Wallace *v.* Pereles, 109 Wis. 316, 85 N. W. 371.

[6] Patterson *v.* Gaines, 6 How. (U. S.) 550.

tion of the first marriage the presumption in favor of the second marriage is opposed to the presumption in favor of the continuance of the first, and a difficult situation results. In discussing this situation we must limit our inquiry to cases where the validity of the second marriage *is being attacked* [7] on the ground that the first marriage still continues, and to cases where no question of criminal law is raised.[8] It is also necessary to rule out cases where one of the marriages was a common law marriage, so called.[9] In the narrowed field thus left it is generally law that the presumption in favor of the second marriage will prevail.

This presumption takes three forms. Occasionally it is based on the presumed invalidity of the first marriage.[10] But more generally it is based on the discontinuance of the first marriage by death or by divorce. The presumption of the death of a former spouse is thoroughly established in our law,[11] but it is obviously swallowed up in the larger and more recent presumption of the termination of the former marriage by divorce. And the presumption of divorce seems to be as clearly settled.[12]

The limits of the divorce presumption, however, are by no means exact. The periods of separation which must intervene between the termination of the first relation and the establishment of the second differ in different jurisdictions, and there is a marked diversity of opinion in regard to the weight to be attached to such factors as the remarriage of the other

[7] It is only where the second marriage is attacked that the law protects it fully with presumptions. If an affirmative attempt is made to prove the validity of the second marriage, an attack on the first marriage is entailed and the presumption shifts to protect the first marriage. Clark *v.* Cassidy, 62 Ga. 407; *Re* Hamilton, 76 Hun 200, 27 N. Y. Supp. 813; Wilson *v.* Allen, 108 Ga. 275, 33 S. E. 975.

[8] In criminal cases the presumptions in favor of the legality of one marriage are met by the presumptions in favor of the legality of the other and the prosecutor must prove his case without a legal bias either way. Lowerey *v.* People, 172 Ill. 466, 50 N. E. 165; Reg. *v.* Lumley, L. R. 1 Cr. Cas. Res. 196.

[9] No presumption will be made "in favor of the guilty parties" where a common-law marriage, or rather the ingredients thereof, is shown subsequent to a ceremonial marriage which has not been dissolved. Nossaman *v.* Nossaman, 4 Ind. 648. A possible exception to the above statement is the presumption that marriage is created by the continuance of the cohabitation after the impediment of the former marriage has been withdrawn, whether or not the parties know of its withdrawal. De Thoren *v.* Atty. Gen., 1 A. C. 686. And the presumption of marriage from cohabitation and repute will not alone overthrow a later ceremonial marriage. Waddingham *v.* Waddingham, 21 Mo. App. 609. See Houpt *v.* Houpt, 5 Ohio Rep. 539.

[10] Palmer *v.* Palmer, 162 N. Y. 130, 56 N. E. 501.

[11] Lockhart *v.* White, 18 Tex. 102, 110; Spears *v.* Burton, 31 Miss. 547; Johnson *v.* Johnson, 114 Ill. 611, 3 N. E. 232; Hunter *v.* Hunter, 111 Cal. 261, 43 Pac. 756; Cash *v.* Cash, 67 Ark. 278, 54 S. E. 744; Nixon *v.* Wichita Co., 84 Tex. 408, 19 S. W. 560; Murchison *v.* Green, 128 Ga. 339, 57 S. E. 709; Smith *v.* Fuller, 138 Iowa 91, 115 N. W. 912; McCausland's Estate, 213 Pa. 189, 62 Atl. 780; Gilroy *v.* Brady, 195 Mo. 205, 93 S. W. 279; Wagoner *v.* Wagoner, 128 Mich. 635, 87 N. W. 898.

[12] Blanchard *v.* Lambert, 43 Iowa 228; Harris *v.* Harris, 8 Ill. App. 57; Klein *v.* Laudman, 29 Mo. 259; Coal Run Co. *v.* Jones, 127 Ill. 379, 8 N. E. 865, 20 N. E. 89; Hull *v.* Rawls, 27 Miss. 471, 473; Carroll *v.* Carroll, 20 Tex. 731, 740; Boulden *v.* McIntire, 119 Ind. 574, 21 N. E. 445; Howton *v.* Gilpin, 24 Ky. L. 630, 69 S. W. 766; *Re* Wile's Estate, 6 Pa. Super. Ct. 435; *In re* Thewlis's Estate, 217 Pa. 307, 66 Atl. 519; Huff *v.* Huff, 20 Idaho 450, 118 Pac. 1080; Shepard *v.* Carter, 86 Kan. 125, 119 Pac. 533; Ross *v.* Sparks, 79 N. J. Eq. 649, 83 Atl. 1118; Goset *v.* Goset, 112 Ark. 47, 164 S. W. 759; Wilcox *v.* Wilcox, 171 Cal. 770, 155 Pac. 95; Bowman *v.* Little, 101 Md. 273, 61 Atl. 223; *In re* Rash, 21 Mont. 170, 53 Pac. 312; Lyon *v.* Lash, 79 Kan. 342, 99 Pac. 598; Gamble *v.* Rucker, 124 Tenn. 415, 137 S. W. 499; Haile *v.* Hale, 40 Okla. 101, 135 Pac. 1143; *Re* Grande, 80 Misc. 540, 141 N. Y. Supp. 535.

party to the first marriage, or the existence of children by the second marriage. Some states, as notably Iowa, require a foundation in fact for the presumption,[13] and refuse to entertain it where the former spouse has not behaved in a way inconsistent with the marriage relation. And Iowa has a further peculiarity in refusing to exercise the presumption in order to "barricade" the rights of one of two rival claimants to the status of surviving widow[14] — a position which seems to lose sight of the reasons underlying the whole use of presumptions in the law of marriage. The lengths to which the presumption will be carried are as uncertain as its scope. Massachusetts and Wisconsin,[15] on the one hand, refuse to notice any presumption of divorce, while a recent New York case,[16] on the other, holds that if the presumption of divorce is overthrown, a presumption that the former marriage has been annulled will arise in its place. Another New York decision[17] which does not deal with divorce is yet significant as showing the length to which a sane court will be carried by its "zeal for legitimacy." In order to validate a common law marriage two prior marriages, together with the requisite parties thereto, were presumed, a third marriage was voided by the presumptive parties, and one of the imagined parties was presumptively deceased in time to make the marriage in question presumptuously valid and its offspring legitimate.

Where a presumption has been carried to such lengths, the important questions become, How much evidence, and evidence of what kind, will be required to rebut the inference? It is clear that something more than the inferential testimony of near relatives that they had never heard of a divorce is necessary.[18] There must be direct proof that there has been no divorce, for the law may require proof of a negative where a negative is essential to the existence of a right.[19] And the question is, What evidence will suffice to establish the negative?

Aside from the Iowa exceptions noted above, proof by a former spouse that he, or she, had never procured a divorce, and had never been served with notice of a divorce, will not suffice.[20] This seems so generally established that it may safely be said that the party attacking the second marriage must prove neither party to the first marriage has obtained a divorce.[21] With this position hypothesized it becomes apparent that the burden of overthrowing the second marriage may be extremely onerous,

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[13] Ellis *v.* Ellis, 58 Iowa 720, 13 N. W. 65; Gilman *v.* Sheets, 78 Iowa 499, 43 N.W. 299; *In re* Colton, 129 Iowa 542, 105 N. W. 1008. The argument advanced is that the presumption of the innocence of the party contracting the second marriage is met by a presumption that he or she would not have procured a divorce on false testimony.

[14] *In re* Colton, *supra*. Either the theoretical ground of innocence or the practical ground of policy in maintaining established relations would seem irreconcilable with this exception. More is at stake than the rights of A. or B. to a widow's legacy.

[15] Randlett *v.* Rice, 141 Mass. 385, 6 N. E. 238; Williams *v.* Williams, 63 Wis. 58, 23 N. W. 110. The argument in the Wisconsin case fails to discriminate between cases of common law and cases of ceremonial marriage, and argues from criminal to civil cases.

[16] Lazarowicz *v.* Lazarowicz, 91 Misc. App. 116, 154 N. Y. Supp. 107.

[17] *In re* Biersack, 159 N. Y. Supp. 519.

[18] Nixon *v.* Wichita Co., 84 Tex. 408, 19 S. W. 560.

[19] Boulden *v.* McIntire, 119 Ind. 574, 21 N. E. 445. See 2 GREENL. Ev., § 454.

[20] Pittinger *v.* Pittinger, 28 Colo. 308, 64 Pac. 195; Coal Run Co. *v.* Jones, 127 Ill. 379, 8 N. E. 865, 20 N. E. 89; Hull *v.* Rawls, 27 Miss. 471, 473.

[21] Chancey *v.* Whinnery, 147 Pac. 1036 (Okla.).

since the party who remarried may have lived anywhere in the interim since the termination of the original relation. And, logically developed, the above position would lead to the result achieved by the Oklahoma court which held, that, although the records of the counties of known residence showed no divorce, the deserting party might yet have obtained a divorce elsewhere.[22] But the sensible rule seems to be that the presumption may be rebutted if the records of the counties of residence of both parties to the first marriage show no divorce.[23]

THE RIGHT OF CREDITORS AGAINST SUBSCRIBERS TO CORPORATE STOCK ISSUED IN RETURN FOR OVERVALUED PROPERTY. — That an examination of the nature and extent of a creditor's right against a subscriber to stock issued for overvalued property is desirable, becomes clear in view of the persistently inadequate treatment accorded this question.[1] A., B. and C. were the incorporators of a company with a capital stock of $60,000, promoted by A., B., C. and D. Stock to the par value of $21,900 was issued as fully paid up to A. and B. in return for a secret process turned in by them.[2] The promoters did not believe the secret process to be worth $21,900 at the time, but they believed the corporation would be able to earn a dividend on a capital stock of $60,000. The "value" of the process was determined by subtracting the value of the other corporate assets from $60,000. D. contracted to buy of the incorporators, for $15,000, one half of the total capital stock, of a par value of $30,000, reserving an option to quit the company at any time and receive back his money. After paying $13,600, D. exercised his option and, on the surrender of the shares to the company, received from it a mortgage to secure the indebtedness. The trustee in bankruptcy petitioned to have the mortgaged property applied to the payment of the general creditors, who became such after D. filed his mortgage. The court refused to grant such relief.

The whole question has been confused by the lack of any clear analysis of the nature of the problem. Many American courts have concluded that by common law the issue of stock for overvalued property is in law a fraud on the creditors, for whose benefit subscriptions to stock are held as a trust fund.[3] From this follows the prevailing notion that the pro-

[22] Haile *v.* Hale, 40 Okla. 101, 135 Pac. 1143.

[23] Smith *v.* Fuller, 138 Iowa 91, 115 N. W. 912; Sullivan *v.* Grand Lodge, 97 Miss. 218, 52 So. 360; Hammond *v.* Hammond, 43 Tex. Civ. App. 284, 94 S. W. 1067; and Wingo *v.* Rudder, 103 Tex. 150, 124 S. W. 899, present sane variations.

[1] See Durand *v.* Brown, 236 Fed. 609.

[2] It was held in O'Bear-Nester Glass Co. *v.* Antiexplo Co., 101 Tex. 431, 106 S. W. 180, that an unpatented secret formula was not "property" within the meaning of a similar statute. It is submitted that the principal case presents the better view in holding this secret process to be "property" within the statute.

[3] The doctrine was invented by Story, J., in Wood *v.* Drummer, 3 Mason (U. S. C. C.) 308. Perhaps the best known case invoking the doctrine is Scovill *v.* Thayer, 105 U. S. 143. Without resorting to the statute under which the corporation was formed, the court declared, in regard to the issue of shares at a discount, that such a transaction "is a fraud in law on its creditors, which they can set aside. . . . The reason is, that the stock subscribed is considered in equity as a trust fund for the payment of creditors."